IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 1021.

WILLMUT GAS & OIL COMPANY,
Petitioner,

vs.

UNITED GAS PIPE LINE COMPANY,
Respondent.

REPLY OF WILLMUT TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JAMES SIMRALL, JR.,
411 Carter Building,
Hattiesburg, Mississippi,
E. J. CURRIE,
508 Ross Building,
Hattiesburg, Mississippi,
GARNER W. GREEN,
801-809 Electric Building,
Jackson, Mississippi,
Attorneys for Petitioner.

SIMRALL, AULTMAN & POPE,
CURRIE & CURRIE,
GREEN, GREEN & CHENEY,
Of Counsel.

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Preliminary Remarks.

A.

Primarily, respondent does not attack the statement of the questions set forth in the petition, but in its response specifically confirms the truth enunciated by the Federal Power Commission that the "facts are largely without dispute", or, as stated in the brief, p. 27:

> "* * * The facts are undisputed. The only dispute has been as to the legal conclusion to be reached, namely, whether the gas was '*intrastate*' or '*interstate*'. * * *." (Italics ours unless otherwise noted.)

Respondent further accepts as appropriately here the six volumes of testimony before the Federal Power Commission filed by petitioner with the Supreme Court of Mississippi in support of its suggestion of error, Br. p. 19. These volumes were not integrated by respondent who consciously omitted them from its pleadings so that naught therein shown was judicially known to Mississippi's Court when it extirpated Mississippi jurisdiction in virtue of the Natural Gas Act (the Act); but we now confidently reassert that stated in the petition as to (a) the Northern segment and (b) the Southern segment (Pet. pp. 21, 24); and, therefore, have Gwinville gas exclusively produced, transported and consumed by residents of Mississippi within fifty miles of the point of origin who were thereasto entitled to enjoy this Mississippi natural resource at just and reasonable rates, based upon the utility "picking it off the vine" and free from the additional charges incident to transportation from the State and consumption beyond whereasto the rates of the Commission would be appropriate. That these local rates may be different from and less than the interstate rates is fundamentally settled under the Transportation Act. Compare *North Carolina* v. *United States*, 325 U.S. 507, 89 L.ed. 1762, where the intrastate rate was 1.65¢ per mile and the interstate rate 2.2¢ per mile. Approved in *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Illinois*, 355 U.S. 309, 2 L.ed. 2d 292, 297. See, also, *Florida* v. *United States*, 282 U.S. 194, 75 L.ed. 291. But the State sovereignty was paramount.

B.

Respondents rely upon an interpretation of the Act in virtue of Mississippi's decision, making the Federal jurisdiction exclusive as to this intrastate movement, wherein the fundamental error is.

1. We, with deference, submit the arguments in the petition are unanswered, but supplementing, submit:

2. In the case of *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 67 L.ed. 1117, Mr. Justice Holmes said, p. 1135:

> "* * * However far the decision in the case referred to goes, it cannot outweigh the consensus of the other decisions to which I have referred and that seem to me to confirm what I should think plain without them, that the Constitution does not prohibit a state from securing a reasonable preference for its own inhabitants in the enjoyment of its products even when the effect of its law is to keep property within its boundaries that otherwise would have passed outside. Hudson County Water Co. v. McCarter, 209 U.S. 349, 357, 52 L.ed. 828, 832, 28 Sup.Ct.Rep. 529, 14 Ann.Cas. 560."

Mr. Justice Brandeis said, pp. 1136, 1143:

> "* * * Each was under the common-law duty of furnishing to the public, through the West Virginia territory in which it does business, adequate service. * * *.
>
> * * *
>
> "* * * In no other field of public service regulation is the controlling body confronted with factors so baffling as in the natural gas industry; and in none is continuous supervision and control required in so high a degree."

See, also, *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1, 73 L.ed. 147. The police power is omni-present and may not be waived. Compare *Stone* v. *State of Mississippi*, 101 U.S. 814, 25 L.ed. 1079. See, also, *Pace* v. *State*, 191 Miss. 780, 4 So.2d 270, collecting and following decisions of this Court.

So, when these Mississippi consumers were thus fundamentally entitled to gas originating at their very doors, it was not the intention of the Act to strike down that whereto, *quoad* intrastate gas, they were entitled. In short, Mississippi's Court by its flat-footed declaration of no jurisdiction as to intrastate gas has discredited, insofar as it was able to do so, and as to Mississippi's local courts, overruled the decisions of this Court, beginning with *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, 610, 88 L.ed. 333, 349, wherein it was said:

> "* * * the bill was designed to take 'no authority from state commissions' and was 'so drawn as to complement and in no manner usurp State regulatory authority'. * * *."

This has been reaffirmed in *Central States Electric Co.* v. *Muscatine*, 324 U.S. 138, 89 L.ed 801, 807 thus:

> "The Natural Gas Act clearly discloses that, though its purpose may have been to protect the ultimate consumer at retail, the means adopted was limited to the regulation of sales in interstate commerce at wholesale, leaving to the states the function of regulating the intrastate distribution and sale of the commodity. That Congress intended to leave intrastate transactions to state regulation is clear, not only from the language of the Act, but from the exceptionally explicit legislative record, and from this court's decisions."

Interstate Natural Gas Company v. *Federal Power Commission*, 331 U.S. 682, 690, 91 L.ed. 1742, 1748:

> "* * * In denying the Federal Power Commission jurisdiction to regulate the production or gathering of natural gas, it was not the purpose of Congress to free companies such as petitioner from effective public control. The purpose of that restriction was, rather, to preserve in the States powers of regulation in areas

in which the States are constitutionally competent to act. Thus the House Committee Report states: 'The bill takes no authority from State Commissions, and is so drawn as to complement and in no manner usurp State regulatory authority . . . .'. * * *."

Panhandle Eastern Pipe Line Co. v. *Public Service Commission*, 332 U.S. 507, 92 L.ed. 128, 139:

"* * * Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the state could not reach. * * *.

* * *

"The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level. We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority. * * *."

Federal Power Commission v. *Interstate Natural Gas Company*, 336 U.S. 577, 93 L.ed. 895.

Federal Power Commission v. *East Ohio Gas Company*, 338 U.S. 464, 94 L.ed. 268, 231:

"This Court can sustain such overlapping and overriding of the state's authority only by repudiating its own recent statements. After reviewing the history of the Natural Gas Act, we have said the 'Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions'. Public Utilities Com. v. United Fuel Gas Co., 317 U.S. 456, 467, 87 L.ed. 396, 402, 63 S.Ct. 369. * * *. And only last year we observed that, 'The Natural Gas Act was designed to supplement state power and to

> produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other'. Federal Power Com. v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 513, 93 L.ed. 1499, 1509, 69 S. Ct. 1251."

So we have the State power supplemented by the Act to bridge a certain chasm; but where State power was adequate, this Court did not strike it down, even as to interstate movement, but recognized it as that which must be preserved to effectively regulate the unlawful acts of utilities, saying in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 92 L.ed. 128, 139:

> "It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption. * * *."

United States v. *Public Utilities Commission*, 345 U.S. 295, 97 L.ed. 1020, 1035:

> "* * * Especially in the litigation arising under the Gas Act has this Court expressed the view that the limitations established on Commission jurisdiction therein were designed to coordinate precisely with those constitutionally imposed on the states. * * *."

Phillips Petroleum Company v. *Wisconsin*, 347 U.S. 672, 98 L.ed. 1035, 1048; *Memphis Natural Gas Co.* v. *Stone*, 335 U.S. 80, 92 L.ed. 1832, 1844; *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 93 L.ed. 1499, 1512; *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 94 L.ed. 268, 283, dissenting opinion Mr. Justices Jackson and Frankfurter.

If respondent's position is correct, not only would Chapter 372, *Mississippi Laws of 1956*, be unconstitutional, but if this decision be allowed to stand, State sovereignty has ceased to exist all along the line, as to:

(a) Section 24, *Mississippi Constitution;*

(b) Intrastate railroad rates, sustained as constitutional as long ago as the *Railroad Commission Cases* (*Stone* v. *Farmers Loan & Trust Co.*), 116 U.S. 307, 29 L.ed. 636;

(c) Regulation of telephones, Chapter 372, *Mississippi Laws of 1956;*

(d) Regulation of telegraphs, Chapter 372, *Mississippi Laws of 1956;*

(e) Regulation of motor carriers, Secs. 7632, *et seq.*, *Recompiled Mississippi Code of 1942;*

(f) The Oil and Gas Board, Secs. 6132-01, *et seq.*, *Recompiled Mississippi Code of 1942*, under which there are the standard provisions as to conservation and proration; as to all of which there is complementary Federal legislation, but in no case have we found a court going to the extent of holding as to that which is exclusively intrastate that the Federal legislation superseded in its entirety State power.

C.

1. Presently had United so thus acted pursuant to Chapter 372, *Mississippi Laws of 1956*, the Public Service Commission would have fixed the rate whereat these consumers would be entitled and under Sections 7716-04, 7716-08, 7716-09, 7716-11, 7716-12, *Recompiled Mississippi Code of 1942*, that rate had to be just and reasonable and predicated upon the property used and useful thereasto.

It is the petitioner's contention that its right to relief on behalf of the consumers is not limited by the discrimination of 17.5¢ against 25¢ per Mcf, but that for the gas consumed, the rate in excess of that which is just and reasonable may be sued for and recovered. Compare *Western Union Tele. Co.* v. *Call Publishing Co.*, 181 U.S. 92, 45 L.ed. 765.

The taking away from those thus entitled to the natural resources at their door and then precluding those thus wronged from having any access to Mississippi's courts—sovereignty—is that which is so fundamentally requisite for rectification.

2. Respondent relies upon the contract between United and Willmut of August 20, 1943, for twenty years, as being so unitizing as to the gas thereunder furnished that the Constitution of the State of Mississippi, as well as its several statutes, became subordinated thereby to the Act. This error is fundamental, and we further submit:

3. Those points made in the petition have not, with deference, been answered.

4. This contract persisted for twenty years, appears as Exhibit "C" to the complaint, and though filed with the Federal Power Commission as Rate Schedule No. 73, by reason of interstate gas being thereunder furnished, there was no requirement by that contract that it be interstate gas. Respondent claimed the right to deliver, and did deliver intrastate gas thereunder, and upon such delivery, petitioner was compelled to pay and to transfer to its customers the unlawful exaction of 25¢ per Mcf. Confessedly for gas originated locally and moving less than fifty miles, United was not in a position in good conscience to exact 25¢ per Mcf when it was exacting at Jackson only 17.5¢ per Mcf for interstate gas coming hundreds of miles. Petitioner has

found no case nor has respondent cited any in which a contract of this character destroyed State sovereignty and made the national sovereignty exclusive. In addition, this contract expressly provided, Section XXII:

> "This agreement and the rights and obligations created hereunder are made subject to and shall conform to all valid present or future laws and rules, regulations and orders of any governmental agency having jurisdiction over the parties or the subject-matter hereof, especially the Federal Power Commission, and both parties agree to conform thereto."

It is not the policy of the Federal government to preempt that regulation which can be under State sovereignty effectively exercised and the decisions hereinbefore collected demonstate that private parties may not thus usurp sovereignty by a private agreement. This was a Mississippi contract. Its laws admeasured. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 78 L.ed. 1178. And it was, under Mississippi law, divisible. Compare *Armfield* v. *Nash*, 31 Miss. 361; *Moore* v. *Illinois C. R. Co.*, C.A. 5, 136 F.2d 412, certiorari denied 320 U.S. 771, 88 L.ed. 461. See, connecting case, *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, 85 L.ed. 1089. See, also, *Williams* v. *Mid-South Paving Co.*, 200 Miss. 103, 25 So.2d 792.

D.

Respondent contends that the adjudication by the Federal Power Commission in Docket No. G-1158 is adequate to conclude the consumers, if it oe that the Natural Gas Act as such does not so do. With deference, this point is well covered in the original petition, but supplementally we submit:

1. The fixation of the 17.5¢ rate on a basis of discrimination after June 30, 1953, was exclusively legislative in

character and not judicial. Respondent adverts to Docket G-1142 before the Federal Power Commission, being a general investigation of the reasonableness of the rates of United. This rate investigation, Docket G-1142, G-2019, *et al.*, of all of the rates of United to which Willmut was and is a party, was reopened by the Commission on June 20, 1958, for further legislative action.

Furthermore, the power delegated to the Commission was exclusively as to the future—not as to the past—and as phrased in *Hope Natural Gas Co.* v. *Federal Power Commission*, C.A. 4, 134 F.2d 287, 309-310:

> "The fundamental difference between quasi-legislative and quasi-judicial power is that the one is concerned primarily with prescribing regulations for the future, the other with determining rights in the light of what has occurred in the past. Cf. Baer Bros. v. Denver & R. G. R. Co., 233 U.S. 479, 486, 34 S.Ct. 641, 58 L.ed. 1055. The Natural Gas Act shows clearly that it was the intention of Congress to give the Commission quasi-legislative power, i.e. regulatory power as to future rates; but there is no indication of any intention to clothe it with judicial or quasi-judicial powers with respect to past charges or practices, such as was vested in the Interstate Commerce Commission by section 9 of the Interstate Commerce Act. 49 U.S.C.A., § 9. * * *."

This was substantially approved by Mr. Justice Douglas on review, *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 88 L.ed. 333.

That such rates thus fixed for the future are legislative is thoroughly settled under the Transportation Act, and this Court dealt therewith in *Oklahoma Packing Co* v. *Oklahoma G. & E. Co.*, 309 U.S. 4, 84 L.ed. 537, 539:

> "* * * But, in Community Natural Gas Co. v. Corporation Commission, 182 Okla. 137, 76 P. 2d 393, de-

> cided after the decree here in issue, the Oklahoma court formally characterized its review in cases prior to the decision in the Oklahoma Cotton Ginners' Asso. Case as 'legislative', refused to give that decision retroactive effect, and therefore deemed the res judicata doctrine inapplicable to these prior reviews. Hence, the plea of res judicata in this case must fail, for on that issue state law is determinative here. * * *."

So, the Commission determined G-1158 solely on the discrimination feature between 25¢ and 17.5¢ per Mcf, but the question in G-1158 as to whether the rate was just and reasonable still persists and is a part of G-1142, G-2019 *et al.*, now reopened by the Commission.

It was this aspect that raised the doubt as to whether this pointed decision in favor of petitioner could be *res judicata*, that is, that the future fixation was legislative and did not relate to the past.

Reverting to the opinion, the Commission adjudged appropriately that it had no jurisdiction as to (a) reparations and (b) fixation as to past transactions and, therefore, thereasto a dismissal was made for want of jurisdiction.

Had this proceeding been in the Federal Court and that Court, with the jurisdiction questioned, adjudged the jurisdiction to have existed then there would be, *quoad* jurisdiction, *res judicata*. Compare *Stoll* v. *Gottlieb*, 305 U.S. 165, 83 L.ed. 104. But the Commission dismissed for want of jurisdiction, which did not preclude a subsequent proceeding in a court having jurisdiction. In *Hughes* v. *United States*, 71 U.S. 232, 18 L.ed. 303, 305, this Court said:

> "* * * In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases,

> and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit. * * *."

In *Swift* v. *McPherson*, 232 U.S. 51, 58 L.ed. 499, 503, Mr. Justice Lamar thus adverted:

> "The record presented an unusual and somewhat ludicrous shifting of positions—with the defendant insisting that a decree be entered against himself; the complainant resisting a decree in his favor; and the defendant, with no cross bill filed, excepting to a dismissal. Of course, this reversal of position does not change the legal effect of the decree, but it serves to emphasize the fact that it was not a decree against plaintiff on the merits, but one based on McPherson's motion which asserted a contract fixing liability and giving him rights dependent on the ultimate outcome of the investment. The court did not decide what those rights were, nor did it adjudicate that a suit to enforce them could not thereafter be filed. The decree, not being on the merits, could not be a bar to such subsequent suit in a state or United States court (Texas Cotton Products Co. v. Starnes, 128 Fed. 183). * * *."

See, also, *Tyler Gas Service Co.* v. *Federal Power Commission*, C.A., D.C., 247 F.2d 590; 42 *Am.Jur.*, "Public Administrative Law", Secs. 161, 163, pp. 520, 524; 73 *C.J.S.*, "Public Administrative Bodies and Procedure", Sec. 147, p. 480.

E.

The effect of Mississippi's Court's expanding Federal jurisdiction on Mississippi consumers of Mississippi gas produced, transported and burned within Mississippi:

United does not challenge the importance of that determined by Mississippi's Court and the necessity of recti-

fication here to prevent needless confusion and expense. Furthermore, respondent does not deign to notice that made requisite by the Federal Power Commission in *Federal Power Commission* v. *Interstate Natural Gas Co.*, 331 U.S. 693, 91 L.ed. 1749, that there be a distribution of the excess to the ultimate consumers who actually bore the wrong admitted by United and for whom, as trustee, Willmut here sues. A court will never permit a trust to fail for want of a trustee, nor will it suffer a trustee to forfeit the rights of the *cestui que trustents*. We make challenge, with deference, of respondent's reply as specious and a fundamental *petitio principii*.

It is respectfully submitted, therefore, that such full response has been made hereby that the Court need not further consider that herein said, but if not satisfied, then:

Reply to Brief.

In response to respondent's COUNTER STATEMENT, Br. p. 1, using respondent's numbering, we submit:

I.

Respondent would lead the Court to believe that the contract, Rate Schedule No. 73, related exclusively to interstate gas and the rate therefor, 25¢ per Mcf. Petitioner challenges. The contract shows (a) that the 25¢ per Mcf rate expired July 25, 1947; and (b) the contract was for Willmut's requirements, but to supply these requirements United was at liberty to introduce intrastate gas and, as shown, did so exclusively, with the approval of the Federal Power Commission as to the segment of its line North of the Gwinville 12" tie line.

Petitioner's postulate was and is that, there being local gas produced, transported and consumed undiluted

within Mississippi, neither the Natural Gas Act nor any action assumed to be taken pursuant to the Act could thereover so divest the jurisdiction of the local Courts in Mississippi to fix the local rates, to appropriately tax as local property, and to hear and determine this question. Compare *Montana-Dakota Utilities Co. v. Northwestern Public Utilities Corp., supra.*

II.

A. We challenge, with deference, respondent's statement, Br. p. 2, as to Docket No. G-1158, see especially *supra* thereasto, and make reference to Sections 12 and 13 of the Formal Complaint therein filed. Note, also, Section 16E, which reads:

> "E. Willmut demands reparations from the date of January 1, 1940, or from such later date as this Commission may award and hereby obligates and binds itself when and if such reparation is thus made, to pass the same on prorata to its customers who have been by said unlawful acts thus damaged."

Willmut challenges as inaccurate the statement, Br. p. 2:

> "Willmut's consistent position in G-1158 was that all gas sold and delivered to it was interstate gas transported through the integrated, interconnected, interstate facilities of United which had been formally certificated by the Commission. * * *."

The customers of Willmut who burned this gas and were charged the $1,000,000 have never been before either court or commission and they are they who are hereunder entitled and Mississippi's Court will not accept a concession of counsel as to the law that will divest these parties' constitutional rights. Compare *Jones v. Madison County*, 72 Miss. 777, 18 So. 87. Throughout the proceedings the differentiation between intrastate gas and interstate gas was

appreciated by Willmut, and judicial power under the common law persisted in Mississippi until March 29, 1956, when administrative jurisdiction first attached. Chapter 372, *Mississippi Laws of 1956.*

While United conceded that the delivery at East Jackson was interstate gas, it was charging the Mississippi Power & Light Company 17.5¢ per Mcf on one side of the street and Willmut 25¢ on the other side of the street for identically the same gas, and generously made a proposition to Willmut that it would at East Jackson reduce the rate to 17.5¢ if Willmut would continue to collect from its customers a rate based on a 25¢ city gate, which Willmut refused to do.

B. The Examiner's opinion speaks for itself and we challenge respondent's interpretation thereof (Br. p. 3).

Petitioner admits that there was but one contract, but the source of the gas was at the election of respondent and it elected to serve intrastate gas, as pointed out in the original petition. Respondent says (Br. p. 3):

> "At the hearing it was proved by Willmut: * * * second, that the gas was a single sale under one contract and was composed of commingled out of state and Gwinville gas save that at East Jackson it was composed only of out of state gas."

This statement, with deference, is inaccurate.

C. We admit that for want of jurisdiction the Examiner and the Federal Power Commission refused either to grant reparations or to make any findings such as were authorized in the *Hope Case, supra*, so that through them United might, in other proceedings, feel the administrative pinch.

We note with interest that the factual background as to the 1/40th of 1% is not controverted in any way; likewise, that the facts as to Christmas are not controverted; likewise, the fact that there was adequate gas in the 16" main wherefrom the intrusion is alleged to have been, to meet the requirements, is not in any way challenged. So with the facts thus admitted—not in dispute (Br. p. 27)—respondent must make the Natural Gas Act cover intrastate gas exclusively. Thus Mississippi's Court has relieved Mississippi's courts from protecting Mississippi consumers as to a natural resource within the State and transferred the onerous burden to the Federal Power Commission and the Federal Courts. The obligation to defend its citizens' rights as to these local matters strongly appertains to the States and they may not be freed therefrom.

United becomes much confused by insisting that this Court should deal with questions of *res judicata* and estoppel which are essentially local in character, and has precluded the State courts from making an appropriate decision as to these strictly local matters. If it be that there is an adjudication controlling or if there be an estoppel as against the customers who are ultimately entitled, that is a matter which the State Court must determine and should be made thus to do; and the State Court is not precluded by the Natural Gas Act from this primary jurisdiction.

United contends that Section 19(b) offered the only method of judicial review, but it is fundamental that if as to this intrastate movement the Federal Power Commission was without jurisdiction, a determination by the Federal Power Commission as to that whereover its jurisdiction was not would be a nullity, especially when as to these matters the dismissal was, not on the merits, but for want of jurisdiction. Compare *Smith* v. *McNeal*, 109 U.S. 426, 27 L.ed. 986; *Murray* v. *Pocatello*, 226 U.S. 318, 57 L.ed. 339;

Annotation, "*Res judicata* effect of judgment dismissing action, or otherwise denying relief, for lack of jurisdiction or venue", 49 *A.L. R. 2d* 1036, 1040; 42 *Am. Jur.*, "Public Administrative Law", Secs. 161, 163, pp. 520, 524; 73 *C.J.S.*, "Public Administrative Bodies and Procedure", Sec. 147, p. 480.

III.

A. United continuously for its own benefit wholly fails to note that this suit is substantially for the benefit of the consumers who have borne the burden of that which is conceded to have been illegal as pointed out in the *Interstate Natural Gas Company Case, supra*; and the power of one suing for the benefit of another to forego and waive that party's rights is a matter whereasto the Supreme Court of Mississippi is the judge when it shall have been freed by this Court from the lack of jurisdiction which it assumed was imposed upon it by the misconstruction of the cases, as shown in the original petition.

Note United claims there was an effort to "separate artificially this single bulk sale of gas" (Br. p. 6), into intrastate and interstate segments. This contract ran for a period of twenty years and was without restriction as to the origin of the gas to be supplied by United to Willmut and if United, as was its right under the terms of the contract, supplied intrastate gas, Willmut was compelled to pay therefor, but when it so did, being intrastate, the relative rights of the parties were governed thereby. The contract was divisible under Mississippi law by reason of monthly payments.

We challenge respondent's interpretation of the Chancery pleadings, with deference, and refer to the pleadings which are more accurately stated in the petition.

C. The facts are as stated in the original petition and not controverted. The gas was not a commingled mass and when respondent seeks to apply that law to the present case it is, with deference, wholly inapposite, a begging of the question.

With deference, we challenge this statement (Br. p. 10):

> "It thus appears that the Presiding Examiner, the Commission and the Supreme Court of Mississippi independently reached identical conclusions resulting in the finding and holding that the single sale of natural gas here involved was solely in interstate commerce *subject to primary and exclusive jurisdiction of the Federal Power Commission,* whereby, the Mississippi Court concluded, beyond the competence of the State Court in respect of damages for any part thereof."

But fortunately this is a Federal question, whereasto decision here must be to prevent confusion as to local rate fixation, local taxation and local court procedure.

The Counter Question is thus stated (Br. p. 10):

> "Where the Federal Power Commission sustaining a purchaser's discrimination complaint under Section 5(a) of the Natural Gas Act adjudicates that the sale of natural gas to such purchaser is, in its entirety, interstate in character and subject to its exclusive jurisdiction (which the Mississippi Supreme Court held also conclusively appeared from this record), does a state court have power to entertain a common law cause for reparations under such purchaser's claim that a portion of such gas delivered under such sale was not interstate, but intrastate in character?"

We answer confidently, for the reasons shown in the petition, that (a) all gas sued for for local consumers was intrastate and none other; (b) the Natural Gas Act could not divest Mississippi's courts' jurisdiction to determine

whether or not gas was interstate or intrastate; and (c) that even if, *quoad* intrastate gas, the Federal Power Commission had adjudged that it was interstate when it in fact was intrastate, that was a question whereasto the Mississippi court would have had a right to adjudge contra, if the Commission had no jurisdiction; and if it found on the facts, then thereasto there might be a final judgment; but when the facts were excluded and not before the Court, no such *res judicata* was potentially possible. We deny specifically that the Federal Power Commission held as claimed. It characterized the gas delivered as intrastate and appropriately so. The Supreme Court of Mississippi, frankly, thoroughly misconceived the decisions of this Court.

IV.

We challenge as inaccurate the statement (Br. p. 11):

> "* * * The Commission, at the behest of Willmut, continued to assert its jurisdiction despite the introduction and commingling of Gwinville gas, reaffirming the completely interstate nature of the sale and its exclusive jurisdiction."

Respondent says (Br. p. 11):

> "* * * The State Court has no power or authority to interfere with such sale nor to entertain any independent or collateral cause of action affecting such sale. * * *."

In addition to the others, the Court's attention is respectfully called to the fact that United has many intrastate rate fixations interspersed along its system and apparently has no published rate for service at New Orleans, Lake Charles, Houston, Dallas, and Austin. The intrastate rates are certainly as low as 14.5¢ per Mcf, as advised by the Railroad Commission, and may be lower.

The differentiation of *McCellan* v. *Montana-Dakota Utilities Company*, D.C. Minn., 104 F.Supp. 46, 204 F.2d 166 (Br. p. 11), is perfectly obvious. Here intrastate gas exclusively under Mississippi sovereignty is sued for in Mississippi's court and the jurisdiction of Mississippi's Court is not ousted by the Federal sovereignty over interstate commerce. Compare *North Carolina* v. *United States*, 325 U.S. 507, 89 L.ed. 1762; *Florida* v. *United States*, 282 U.S. 194, 75 L.ed. 291.

It is true that before the Commission there was an adjudication for purposes of legislatively fixing rates for the future. There was under the case of *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 100 L.ed. 373, no published rate after July 25, 1947, when the contract rate ceased and United breached its agreement whereasto it incurred a damage responsibility.

As to *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 95 L.ed. 912, this is fully dealt with in the petition, pp. 10-15. As to gas moving actually in interstate commerce there can be but the published rate, but here the gas was intrastate whereasto no published rate was required and incidentally no published interstate rate was then applicable.

As to *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, C.A. 5, 162 F.2d 388 (Br. p. 13), the writer lost this case and was thoroughly conversant with it when this suit was instituted and; with deference, it is wholly inapposite.

Natural Gas Pipeline Co. v. *Harrington*, 246 F.2d 915 (Br. p. 13), is not apposite. There was a contract, though not filed, and the rate therein *inter partes* controlled. The Oklahoma Commission was without jurisdiction. Its order was a nullity, and hence disregarded—precisely as will be

any order made by the Federal Power Commission as to strictly intrastate gas. If thereof the Commission is cognizant it will not take jurisdiction. *North Dakota* v. *Federal Power Commission*, C.A. 8, 247 F.2d 173.

Glassberg v. *Boyd*, 116 A.2d 711 (Br. p. 13), is obviously inapposite. Though cited in the Supreme Court of Mississippi it was not regarded there as in any way controlling.

We likewise rely upon *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 98 L.ed. 1035 (Br. p. 14); but while Federal jurisdiction may be, in certain aspects, uniform, under the Bankruptcy Act it does vary from State to State and, where intrastate commerce is involved, the State law is that which is sovereign, unless there be a violation of the equivalent of Section 13.4 of the Transportation Act. *Houston, E. & W. T. R. Co.* v. *United States*, 234 U.S. 342, 58 L.ed. 1341.

Natural Gas Pipe Line Company v. *Panoma Corporation*, 349 U.S. 44, 99 L.ed. 866 (Br. p. 14), is inapposite and insofar as it goes is favorable to petitioner.

Federal Power Commission v. *East Ohio Gas Co.*, 338 U.S. 464, 94 L.ed. 268 (Br. p. 14), has been dealt with *supra*.

We have examined the other cases cited by respondent (Br. p. 14), and, with deference, submit naught therein contra.

The fact that there is an interstate commerce does not destroy intrastate commerce; and United's rate structure is such that, if examined, it will show divers intrastate rates variant from the interstate rates. These excrescences require critical examination in the light of surrounding facts, which the Supreme Court of Mississippi expressly denied Willmut the right to have. Compare *Byrd* v. *Blue Ridge Rural Electric Co-op.*, 356 U.S. , 2 L.ed. 2d 953, where

Mr. Justice Brennan held a party entitled to introduce its own evidence when there had been a correct appraisal of the Natural Gas Act.

We have and do, with deference, rely upon *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 51 L.ed. 553 (Br. p. 15). It is not essential to take away from these customers this $1,000,000 wrongfully collected by United constituting, with deference, a ravishment under color of law whereasto, if potentially possible, rectification must be.

Federal Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591, 88 L.ed. 333 (Br. p. 15), has been discussed *supra*, and we are dealing here with a right of a Court here in Mississippi to determine whether the gas was intrastate or interstate. Thereasto local policy may have much to do. *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 67 L.ed. 1117.

Interstate Natural Gas Co. v. *Southern California Gas Co.*, C.A. 9, 209 F.2d 380 (Br. p. 15), contains naught contra to that herein contended.

The Federal Power Commission separated this cause after it had been pending on the congested docket of the Commission for nearly five years and all that Willmut could do was to make it not a general rate case but solely a discrimination case, and this with the aid of the Commission staff. Five years' collection of a rate 50% too high is no small matter when it comes from those ratepayers least able to stand such unlawful exactions.

State Corporation Commission of Kansas v. *Federal Power Commission*, C.A. 8, 215 F.2d 176 (Br. p. 16), contains naught contra. That company could have published a rate had it seen fit to do so and its loss was due solely to its own course of conduct, whereas Willmut's customers have no such position.

The time lag has been usually, as pointed out in the present litigation, more than five years, and since the reopening of Docket No. G-1142, G-2019, *et al.*, it may now exceed ten years.

V.

Our answers thereto are:

1. That the Courts of Mississippi have been denied jurisdiction to pass upon the plea of *res judicata* and until the right to be heard is restored it is needless to speculate. When, if and after the misconception of Mississippi's Court has been rectified in this Court, the plea of *res judicata*, which is a local question, can be and will be adequately litigated in the appropriate tribunal. It has no place in the consideration of this writ of certiorari directed exclusively to the exclusion of Mississippians from Mississippi courts to consider a Mississippi transaction in virtue of a Federal law and the action of a Mississippi court in refusing to allow a party suing exclusively for intrastate gas to introduce evidence thereasto. All of these questions are exclusively local questions and no attention can be given them here, but they must be first determined after rectification has been wrought by righting Mississippi's Court's adjudication as to the Natural Gas Act. Mississippi's Court had presented to it by United a second question thus:

> "* * * and, furthermore, this exclusive jurisdiction of the Federal Power Commission has previously been directly invoked by Willmut, relief thereon was obtained by it and consequently res judicata applies."

But Mississippi's Court did not determine that question because it did not reach it by reason of its mis-assumption that there was no jurisdiction in the Mississippi Court—an error arising from its mis-construction of the decisions of this Court.

The quotation from the Examiner's opinion, Br. p. 17, is mis-leading. Respondent should have started the quotation one paragraph before, thus:

> "Accordingly, even if United's rearrangement of its system operations had accomplished a complete substitution of intrastate for interstate deliveries from the Jackson-Hattiesburg line, such unauthorized rearrangement of its system can avail it nothing in this case."

So the Commission was but re-establishing that which United had endeavored to abandon and had abandoned, but its act in so doing was unlawful and continued to be unlawful. That here at issue is, may its unlawful act be made the predicate of the right to retain that which it unlawfully exacted from the customers in Mississippi?

2. As to the question of estoppel against Willmut's customers by its brief, Br. pp. 18, 19, it was conceded that the movement at East Jackson was always a mixture, but nevertheless United charged Willmut 25¢ while charging its competitor across the street 17.5¢.

3. As to the effect of the estoppel by the argument assumed to be quoted of Willmut's counsel before the Federal Power Commission, it is respectfully submitted that this cannot be here considered, as Mississippi's Court must first have had jurisdiction to consider the local question of estoppel; and when it receives the right to proceed in accordance with its Constitution, the answer will be made in such a form as that United may not therefrom profit, for the Commission, where there was an issue as to the rate on a discrimination basis, after the most active litigation, determined *inter partes* that there was a discrimination and adjudged accordingly.

If there be power to consider it, Mr. Poindexter, as to the argument of counsel, answered under oath thus:

"Q. And if on any given day a situation arises such as December 25, 1948, under normal operating conditions for that day, gas will flow from the Jackson-Mobile line into the Jackson-Hattiesburg line?

"A. No sir, because that was not a normal operating condition on December 25, 1948, when gas flowed from the 16-inch back into the 8-inch. That was strictly an abnormal condition."

The relief Willmut obtained from the Commission was under Section 7 of the Act under which the abandonment was prohibited.

4. We can only reiterate that the merits will be fully developed when Willmut is allowed on behalf of its customers to assert its cause of action in the State court.

A. Br. p. 20. With deference, as above shown where there can be no decision on the merits the doctrine of *res judicata* may not in any way apply, and the Commission had no jurisdiction *quoad* reparations.

We do not criticize *Sunshine Anthracite Coal Company* v. *Adkins*, 310 U.S. 381, 84 L.ed. 1263, Br. p. 20.

The decisions cited by respondent, Br. p. 21, simply, with deference, are not apposite where the Commission acted as to the future legislatively to determine a rate; but if it be that this is quasi judicial, then we have collateral estoppel. Compare *Cromwell* v. *Sac County*, 96 U.S. 51, 24 L.ed. 681.

B. Br. p. 21. Estoppel is a State question before a court having jurisdiction. This is an appellate tribunal and that issue has never been tried by the Supreme Court of Mississippi and thereasto it should make a determination as was held appropriate in *United States* v. *Public Utilities Commission*, 345 U.S. 295, 97 L.ed. 1020.

VI.

As to the admeasurement, it was essential that Mississippi's Court have jurisdiction and until rectified argument is useless. We repeat, as to the Northern segment, no interstate gas; as to the Southern segment: no interstate gas after November 1, 1950, and prior thereto only 1/40th of 1% possibly. Can United, voluntarily supplying local gas to these consumers in Mississippi, gouge them by taking away the right of local authorities to fix these rates, to tax this property and to allow recovery in the local courts?

VII.

Counsel say, Br. p. 23:

> "Willmut's position is unreal and untenable".

This we categorically deny.

Counsel's declaration that Mississippi's Court will not "allow damages for any refusal to arbitrate", Br. p. 24, is ill-founded.

It is true that in *Peoples Natural Gas Co.* v. *Public Service Commission*, 270 U.S. 550, 70 L.ed. 726, Br. p. 24, reference was made to non-action by Congress, but as shown by all the cases collected *supra*, the Act was a complement for regulation and did not in any way destroy State power. If this case is no longer the law, with deference, let it be expressly overruled, for it certainly does mislead if it be not as we contend it is when coordinated with the decisions noted *supra*, beginning with the *Hope Case*.

We stand with confidence upon our interpretation of *North Dakota* v. *Federal Power Commission*, and the other cases, Br. p. 25. They speak for themselves. If we have

misinterpreted and the Court allows a sale for requirements where there is no specification for the source of such sale, with a provision such as Section XXII, above quoted, to divest State power over local affairs so that a utility may, notwithstanding the declaration of the purpose of the Act in the *Hope Case*—the curbing of the rapacity of the pipe line companies—to retain this $1,000,000 that belongs to its citizens, then we have no further complaint, but do warn, with deference, that rectification is essential to allow local citizens to sue in matters of this kind and to prevent the flooding of the Federal courts with cases that do not belong there, as well as to preserve intact the local statutes, especially Chapter 372, *Mississipppi Laws of 1956*, and the others, as well as to preserve appropriately the power of taxation. Compare *Detroit* v. *Murray Corporation*, 355 U.S. 489, 2 L.ed. 2d 441, 460.

The Chancery Court of Forrest County had plenary jurisdiction to make a determination as to whether this was intrastate gas or not; and the sole thing that prevented this determination from being made was the holding by Mississippi's Supreme Court that the Natural Gas Act divested all jurisdiction thereasto. The *Abilene Case, supra*, insofar as local intrastate causes of action were concerned, equally preserved them under Chief Justice White's convincing opinion.

Respondent says, Br. p. 27:

> "* * * The facts are undisputed. The only dispute has been as to the legal conclusion to be reached, namely, whether the gas was 'intrastate' or 'interstate'. * * *."

We propound to the Court, with this admission, the question stated in the original petition, with the fullest confi-

dence that this Court, as the sole authority competent to rectify, will do its full duty.

Respectfully submitted,

JAMES SIMRALL, JR.,
411 Carter Building,
Hattiesburg, Mississippi,
E. J. CURRIE,
508 Ross Building,
Hattiesburg, Mississippi,
GARNER W. GREEN,
801-809 Electric Building,
Jackson, Mississippi,
Attorneys for Petitioner.

SIMRALL, AULTMAN & POPE,
CURRIE & CURRIE,
GREEN, GREEN & CHENEY,
Of Counsel.